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3:98-CR-00519 USA V. BOGART

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BY: *J. Mitchell*

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,)	CR Case No. 98-0519-JM
13 Plaintiff,)	Sentencing: 12/18/98
14 v.)	8:30 a.m.
15 RUSSELL J. CONTE,)	DEFENDANT CONTE'S
16 Defendant.)	PRESENTENCE
)	MEMORANDUM

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7 I. OVERVIEW

8 CONTE, age 41, married with three children, has plead guilty
 9 to one count of wire fraud for his involvement in a fraudulent
 10 scheme in which his former friend, MURDOCK, lost \$2.7 million.
 11 CONTE believes he is in Criminal History Category II, and, without
 12 downward departure but with -3 for acceptance of responsibility and
 13 without +2 for abuse of position of trust, has a total offense
 14 level of 18, which results in a Guideline range of 30-37 months.
 15 CONTE asks for departure of at least 10 levels for a Guideline
 16 range of 4-10 months¹, Zone B, and halfway house/work release. By
 17 separate motion CONTE requests downward departure on various
 18 grounds, the most important of which are post-conduct/pre-criminal
 19 investigation rehabilitation and restitution and diminished
 20 capacity/bi-polar condition.

21 II. SUMMARY OF WRITTEN PLEA AGREEMENT

22 By the written plea agreement, CONTE has plead to one count of
 23 wire fraud, 18 U.S.C. §1343. Under the detailed factual basis

24 ¹ If the court agrees with CONTE and finds no
 25 additional 2 points for abuse of position of trust, CONTE'S
 26 offense level is 18: $6 + 13 + 2 - 3 = 18$. An offense level
 27 of 18 and Criminal History Category of II yields 30-37
 28 months, Zone D. A downward departure of 10, an offense
 level of 8 and a Criminal History Category of II yields 4-10
 months, Zone B. If the Government prevails on the position
 of trust issue and the court finds Criminal History Category
 II and departs downward 10 levels, this yields 8-14 months,
 Zone C.

1 contained at pages 3-9, the fraudulent scheme is explained. In
2 short, CONTE, then living in Utah, recommended that his friend,
3 MURDOCK in Utah, invest with BOGART and LUCCI, both of San Diego.
4 Unknown to MURDOCK, CONTE and BOGART agreed that CONTE would
5 receive 10% of all monies MURDOCK invested with BOGART, and CONTE
6 in fact received the 10% monies. It was not until MURDOCK invested
7 over a million dollars with BOGART that CONTE realized that BOGART
8 was scamming MURDOCK. Thus, BOGART was defrauding both MURDOCK and
9 CONTE, and at the same time CONTE defrauded MURDOCK by not
10 informing MURDOCK of the 10% CONTE was receiving. In addition,
11 once CONTE discovered BOGART'S fraud, he agreed to the continuation
12 and entered into an agreement with BOGART under which CONTE was to
13 receive a higher percentage.

14 At page 13 of the plea agreement the parties agree to
15 recommend a base offense level of 6, +13 for loss of more than \$2.5
16 million, +2 for more than minimal planning, and -3 for acceptance
17 of responsibility, resulting in an adjusted offense level of 18.
18 In addition, the Government will recommend +2 points for violation
19 of position of trust "as MURDOCK'S financial advisor and friend"
20 and CONTE has leave to oppose the adjustment, which he has done by
21 his objections to the PSR and this memorandum. There is no
22 agreement as to the Criminal History Category.

23 As to departures, CONTE may argue for downward departure on
24 any ground and he has filed a Motion for Downward Departure. The
25 Government opposes any departure, but agrees not to recommend any
26 upward departure. Id. pg.14. The Government recommends a sentence
27 of 41 months. Id. at pg.14.
28

1 The parties do not make any recommendation with respect to a
2 fine, but jointly recommend that CONTE pay restitution in the
3 amount of \$2,691,555 to MURDOCK. Id. at pg.16.

4 Finally, CONTE waives his appeal in any collateral attack
5 unless the court imposes a custodial sentence greater than the high
6 end of the Guidelines in accordance with the offense level agreed
7 to and recommended by the parties, which is 18. Id. at pg.16. The
8 Government's position is that the Criminal History Category is III,
9 whereas CONTE argues that it is II. Again, under Category III,
10 offense level 18, the Guideline range is 33-41 months; under
11 Category II, offense level 18, the range is 30-37 months; thus, the
12 high end with respect to an appeal is 41 and 37 months,
13 respectively.

14 **III. CRIMINAL HISTORY CATEGORY**

15 The probation officer calculated a Criminal History Category
16 of III; the Government objected and added 1 point, which also
17 resulted in a III. The Defendant's position is that the Criminal
18 History Category is II. See Charts, EXHIBITS 1 and 2, attached.

19 It is clear that the federal courts give deference to a state
20 court's decision to vacate a criminal judgment and sentence. See,
21 e.g., U.S. v. Guthrie, 931 F.2d 564, 572 (9th Cir. 1991) (where
22 "state court vacates a defendant's prior state conviction, the
23 sentence resulting from that conviction may not influence the
24 defendant's criminal history score under the Guidelines.")).
25 Moreover, it is clear that home detention is not imprisonment.
26 See, e.g., U.S. v. Phipps, 68 F.3d 159, 162 (7th Cir. 1995)
27 (imprisonment used in the Guidelines means time in a penal
28

1 institution; home detention is not imprisonment; it is a
2 "substitute for imprisonment."). Likewise for work release. See
3 also, U.S. v. Compton, 82 F.3d 179, 183-184 (7th Cir. 1996)
4 ("imprisonment" is "time actually spent in a penal institution;"
5 citing Phipps).

6 Thus, as shown in EXHIBIT 2, CONTE receives 3 criminal history
7 points: 1 for the Utah federal "sentence of imprisonment" of less
8 than 60 days, and 2 for commission of the offense while on
9 probation. Contrary to what the Government claims, CONTE does not
10 receive 1 point under \$4A1.1(e) (offense committed within 2 years
11 of prior offense) because (e) applies only to (a) (1 year or more)
12 and (b) (6 months or more) offenses, and CONTE has none; CONTE'S
13 Utah federal offense is a (c) (less than 60 days) because the
14 "sentence of imprisonment" was modified to a six-week
15 (approximately 45 days) sentence.²

16 **IV. ABUSE OF TRUST: SENTENCING ENHANCEMENT UNDER \$3B1.3 IS**
17 **INAPPROPRIATE IN THIS CASE.**

18 **A. The Plea Agreement**

19 The plea agreement at pg.14 permits the Government to
20 recommend, and CONTE to oppose, application of a two-level upward
21 adjustment for "violation of a position of trust," pursuant to
22 \$3B1.3, which calls for an upward adjustment where CONTE "abused a
23 position of public or private trust, or used a special skill, in a
24 manner that significantly facilitated the commission of or
25 concealment of the offense." The Government makes no claim as to

26 ² In CONTE's objections to the PSR, incorporated by
27 reference, CONTE submitted court records and evidence of the
28 Utah federal sentence modification.

1 skill, only as to trust; and as the circuit cases demonstrate,
2 friendship is not enough. CONTE submits that the §3B1.3 is wholly
3 inapplicable to the facts of this case.

4 **B. Application Note**

5 Application Note 1 to §3B1.3 states that "public or private
6 trust refers to a position of public or private trust characterized
7 by professional or managerial discretion (i.e., substantial
8 discretionary judgment that is ordinarily given considerable
9 deference)." Application Note 2 defines special skill as "a skill
10 not possessed by members of the general public and usually
11 requiring substantial education, training, or licensing. Examples
12 would include pilots, lawyers, doctors, accountants, chemists, and
13 demolition experts." It is significant to note that the
14 Application Note was amended, which amendment took effect on
15 November 1, 1993. By the amendment, the Commission places the
16 emphasis on managerial and professional discretion. Thus, this
17 court should be watchful for any pre-November 1, 1993 cases upon
18 which the Government relies. The impact of the amendment is well
19 illustrated in the case of U.S. v. Recco, 151 F.3d 29 (1st Cir.
20 1998) in which the court held that a receptionist/switchboard
21 operator at a police headquarters did not occupy a position of
22 trust where she unlawfully gave notice of an impending search and
23 seizure. In Recco at 31, the court explains that: "The
24 Application Notes, as amended in 1993, explain that positions of
25 trust are characterized by significant discretion and minimal
26 supervision:" and then goes on to quote the new Application Note,
27 which we quote here in part:
28

1 "Public or private trust" refers to a position of public
2 or private trust characterized by professional or
3 managerial discretion (i.e., substantial discretionary
4 judgment that is ordinarily given considerable
5 deference). Persons holding such positions ordinarily
6 are subject to significantly less supervision than
7 employees whose responsibilities are primarily non-
8 discretionary in nature. For this enhancement to apply,
9 the position of trust must have contributed in some
10 significant way to facilitate in the commission or
concealment of the offense (e.g. by making the detection
of the offense or the defendant's responsibility for the
offense more difficult). This adjustment, for example,
would apply in the case of an embezzlement of a client's
funds by an attorney serving as a guardian, a bank
executive's fraudulent loan scheme, or the criminal
sexual assault of a patient by a physician under the
guise of an examination. ***" (Emphasis added.)

11 In Recco at 32, the court found that, although Recco's
12 "position afforded her access to information," it did not repose
13 "in her" a "discernable discretion." In fact, the prosecutor
14 admitted that her position "involved no significant discretionary
15 authority. Id. Likewise for CONTE.

16 C. General Principles

17 The prosecution bears the burden of establishing, by a
18 preponderance of evidence, operative facts which rendered the
19 application of a sentence enhancement appropriate in any given
20 case. See, e.g., U.S. v. Howard, 894 F.2d 1085, 1090 (9th Cir.
21 1980).

22 With respect to the concern of "position of trust," the
23 Commission has provided little guidance in identifying a qualifying
24 relationship, other than to note the requirement of "professional
25 or managerial discretion." Circuit opinions on this issue,
26 however, elucidate certain principles which are pertinent in the
27 present context. For example, it has been noted that §3B1.3 "...
28

1 refers exclusively to employment or professional relationships ..."
2 U.S. v. Pardo, 25 F.3d 1187, 1190 (3rd Cir. 1994).

3 Exceptions to this qualifying feature do exist, but they pre-
4 date the 1993 Application Note amendment discussed, supra. Two
5 cases have found the existence of a trust relationship where a
6 mother utilized a daughter's services in narcotics offenses and a
7 baby sitter took advantage of his position to commit sexual abuse
8 on a minor. U.S. v. Ledesma, 979 F.2d 816, 822 (11th Cir. 1992)
9 (mother-daughter). U.S. v. Zamarripa, 905 F.2d 337 (10th Cir.
10 1990) (baby sitter/minor). Nonetheless, the unifying principle
11 behind these varying contexts is "the authority given to defendant
12 by the position which provides the wherewithal to commit the
13 wrongful act." Pardo, supra at 1192. That is, "the position of
14 trust is characterized by access or authority over valuable
15 things." U.S. v. Lamb, 6 F.3d 415, 421 (7th Cir. 1993).

16 The Sixth Circuit has noted that under §3B1.3:

17 The element of professional or managerial
18 discretion is said to be the key. And, by
19 focusing on the deference ordinarily accorded
20 the substantial discretionary judgment
21 possessed by the holder of such a position of
22 trust, the sweep of the commentary's
23 definition is significantly narrowed.... as
24 used in the guideline, "position of public or
25 private trust" is a term of art, appropriating
26 some of the aspects of the legal concept of a
27 trustee or fiduciary.

23 U.S. v. Ragland, 72 F.3d 500, 502-03 (6th Cir. 1996). (Emphasis
24 supplied.) In accord, U.S. v. Jolly, 102 F.3d 46, 48-49 (2nd Cir.
25 1996).

26 It is apparent from the foregoing that, at least in the
27 framework of economic offenses, the position of trust upon which an
28

1 enhancement may be applied must assume the character of "trustee"
2 or "fiduciary," bearing the element of authority or discretion
3 which is capitalized upon by the defendant. The total absence of
4 these elements in CONTE'S case bars an adjustment under §3B1.3.

5 **D. The Factual Basis**

6 The factual basis underlying CONTE'S guilty plea appears at
7 pages 3-9 of the plea agreement (P.A.), and the following
8 stipulations (emphasis supplied) are particularly relevant to the
9 §3B1.3 issue:

10 1. "Defendant had been a long time acquaintance and
11 close personal friend of Kenneth Murdock [the victim]." (PA, at
12 p.3)

13 2. "In 1992 Murdock asked defendant, who had
14 experienced some personal financial and legal difficulties, to act
15 as an advisor to assist Murdock in investing some money..." (PA,
16 p.3)

17 3. "Third parties [Bogart and Lucci] devised a scheme
18 whereby, through false representations, they would get Murdock to
19 invest his money with them." (PA, p.4)

20 4. "Unknown to Murdock, for whom defendant was an
21 investment advisor [not a licensed "investment advisor"], defendant
22 demanded a finders fee of ten percent from Bogart and Lucci..."
23 (PA, p.4)

24 5. "Based on the presentation and persuasion by Conte,
25 Murdock made a trial investment ..." (PA, p.5)

26 6. "Within a few weeks thereafter ... Murdock agreed to
27 make a second investment ..." (PA, p.7)
28

1 7. "After Murdock made the 'second investment,'
2 defendant found out that the whole investment scheme was a fraud.
3 Instead of telling Murdock, he demanded that Bogart make him a
4 fifty percent partner in the proceeds of all future investments by
5 Murdock." (PA, p.8)

6 8. "Defendant, although fully involved in the scheme,
7 continued to act as Murdock's advisor, and Murdock continued to
8 rely upon the investment advice being given by his good friend."
9 (PA, p.8)

10 It is apparent from the core stipulations that the concept of
11 "position of trust" in this case derives from CONTE'S
12 characterization as a personal friend and "investment advisor,"
13 whatever that loosely means, given that CONTE was not a licensed
14 investment advisor and did not hold himself out to be such. As the
15 cases discussed, infra, will demonstrate, this is not a
16 "distinction without a difference." As will also be obvious by the
17 case law: neither characterization supports the enhancement under
18 the specific facts of CONTE'S case. Moreover, it can hardly be
19 said the MURDOCK was a vulnerable victim.

20 **E. Case Discussion**

21 Pardo, supra, involved a defendant whose personal friendship
22 with a bank manager played a role in his successful carrying out of
23 fraudulent transactions with the bank. The existence of that
24 friendship was not permitted to support a sentence enhancement
25 under §3B1.3 because, "At most, [Pardo's] position as a friend
26 allowed him the opportunity to commit an easily detectible wrong
27 ... Even more clearly lacking [in Pardo's case] is the requisite
28

1 degree of authority over the object of his wrong [Pardo] had
2 no authority over anyone or anything necessary to the commission
3 of his crimes." Id. at 1192. (Emphasis added.) Likewise for
4 CONTE.

5 Similarly, in U.S. v. Mullens, 65 F.3d 1560 (11th Cir. 1995),
6 the defendant took advantage of personal friendships at a country
7 club to solicit investors in a "Ponzi" scheme he had devised. The
8 court rejected a proposed enhancement under §3B1.3, primarily
9 because the defendant "was not in a position of trust simply by
10 virtue of developing ordinary social relationships." (Emphasis
11 supplied.) Id. at 1566. The court further noted that
12 "Fraudulently inducing trust in an investor is not the same as
13 abusing a bona fide relation of trust with the investor." Id. at
14 1567. It appears from the foregoing that a relationship of
15 friendship between parties is not sufficient as a factual
16 springboard for the enhancement proposed by the Government. CONTE
17 further submits that the gratuitous description of defendant as an
18 "investment advisor" affords no basis for the enhancement at issue.
19 It has been noted, in the context of §3B1.3 that "an investment
20 advisor/broker is typically an individual who is entrusted with
21 discretionary authority to manage the assets of his or her clients
22 through the application of specialized knowledge." (Emphasis
23 added.) U.S. v. Queen, 4 F.3d 925, 929 (10th Cir. 1993). Such a
24 person clearly occupies a "position of trust" under the Guidelines.
25 See, U.S. v. Tardiff, 969 F.2d 1283, 1389 (1st Cir. 1992). But, of
26 course, this means a licensed "investment advisor," not a
27 friend/investment advisor. Moreover, the enhancement will apply to
28

1 a defendant who falsely represents himself to be a professional
2 financial consultant and who then proceeds to exercise broad
3 discretionary powers in respect to other people's assets. Queen,
4 supra, at 929. CONTE did not claim to be a professional financial
5 consultant.

6 **F. CONTE: Not a "Fiduciary" or a "Trustee"**

7 The factual basis of CONTE'S plea discloses the absence of
8 factors rendering CONTE in a cognizable position of private trust
9 vis a vis the victim, MURDOCK. Nowhere is it alleged that CONTE
10 held himself out to be a professional financial consultant. In
11 that sense, he was no more a "fiduciary" or "trustee" than a
12 personal friend one consults as to what kind of car to buy. More
13 importantly, CONTE at no time exercised any professional or
14 managerial discretion with respect to the invested funds at issue.
15 CONTE initially concealed his finder's fee interest in monies
16 fraudulently obtained by third parties, and later profited from the
17 third party fraud when he discovered its existence. CONTE never
18 managed the assets of the victim, and never claimed to possess
19 special knowledge, skill or status as an investment counselor. At
20 best for the Government, CONTE abused a position of personal
21 friendship, but that fact alone has never been held to constitute
22 a basis for enhancement under the trustee or fiduciary concept
23 contemplated by the Sentencing Commission.

24 Moreover, whether one applies an objectively reasonable or
25 subjectively reasonable test, it should be noted that MURDOCK'S
26 claimed reliance on CONTE was clearly unreasonable, given that
27 MURDOCK knew, inter alia, that:
28

1 a. CONTE had mental problems (diminished
2 capacity/bi-polar condition);

3 b. CONTE had been convicted of a felony in federal
4 court in Utah for failure to pay taxes and spent time in jail;

5 c. CONTE was on probation for the federal offense;

6 d. CONTE repeatedly failed in his business
7 ventures.

8 In addition, recall that MURDOCK had a professional advisor,
9 BOREN, MURDOCK'S business manager. Thus, it can hardly be said
10 that MURDOCK, a sophisticated businessman who owned a multi-million
11 dollar business, could have reasonably relied upon CONTE as his
12 friend and/or financial advisor for sophisticated financial advice
13 involving hundreds of thousands of dollars. Moreover, how can it
14 be said that MURDOCK, a self-made millionaire in sound mental
15 health, was a vulnerable victim? What we have here is a situation
16 of, at most, and at best for the Government, friendship, which is
17 not sufficient to cause a 2 level increase under §3B1.3. Like
18 Pardo, the friendship does not support a sentence enhancement
19 because "at most, CONTE'S position as a friend allowed him an
20 opportunity to commit an easily detectable wrong...." CONTE, like
21 Mullens, "was not in a position of trust simply by virtue of
22 developing ordinary social relationships."

23 While on the one hand MURDOCK complains that CONTE misled him
24 concerning CONTE'S investigation of BOGART and LUCCHI, MURDOCK
25 proceeded unreasonably, with "willful blindness," ignoring the
26 adages, "If it sounds too good to be true, it is, and "Pigs get
27 fat; hogs get slaughtered." Knowing CONTE was a convicted felon,
28

1 had lost \$900,000 in investments from friends, and was bi-polar,
2 MURDOCK obviously should have conducted independent due diligence
3 with respect to the activities of BOGART, LUCCI and even CONTE.

4 Yes, CONTE and MURDOCK were close friends. But, CONTE was not
5 licensed as an attorney, accountant, financial advisor, financial
6 planner, stockbroker, or the like. Nor did CONTE hold out to
7 MURDOCK that CONTE held expertise in the area of business
8 investments. Quite to the contrary, by CONTE'S track record of
9 repeated failing businesses, CONTE was a perfect example as to how
10 not to proceed in business matters. MURDOCK was on notice of
11 CONTE'S personal (mental, emotional and financial) and professional
12 (business/financial) shortcomings. MURDOCK played out his role of
13 loyal friend to CONTE. And, MURDOCK had a business manager, BOREN,
14 who in fact was against the subject investments. That MURDOCK
15 foolishly listened to CONTE, not to BOREN, attests to MURDOCK'S
16 lack of business judgment, and to his greed, not to any position of
17 trust held or claimed by CONTE.³

18 The CONTE and MURDOCK friendship began circa 1992. MURDOCK
19 was undergoing marital problems and in fact was separated from his
20 wife and lived in a condo and kept begging CONTE to live in the
21 condo with him. CONTE and MURDOCK would spend considerable time
22 together, including not only working out, but going to basketball
23 games and restaurants. MURDOCK was very much taken back when
24 CONTE, who was already married, did not have the time to spend with
25 MURDOCK and would not leave CONTE'S wife and children to live with
26

27 ³ MURDOCK expected a quick 15% return on his money. "If
28 it sounds too good to be true, it is."

1 MURDOCK. In fact, CONTE and his family moved to Arizona for
2 purpose of getting away from MURDOCK, given MURDOCK'S overbearing,
3 controlling, and manipulative personality. MURDOCK'S claim that
4 CONTE "was the key to the entire fraud," PSR page 4, line 36, is
5 belied by the probation officer's recognition that but for BOGART
6 and his scheme devised ab initio by BOGART, there would have been
7 no involvement by CONTE in this MURDOCK fraud.

8 MURDOCK did not hire CONTE as a "financial advisor at a salary
9 of \$4,000 per month," PSR, page 5, line 6. Rather, MURDOCK,
10 knowing of CONTE'S sordid background and financial difficulties,
11 agreed to loan CONTE about \$50,000. In fact, an amortization
12 statement was prepared by MURDOCK'S CPA firm at MURDOCK'S request.
13 See EXHIBIT 3. CONTE has checks showing interest payments from
14 CONTE to MURDOCK. See EXHIBIT 4.

15 Known to MURDOCK, other friends of MURDOCK and CONTE suffered
16 financial losses after investing with CONTE: \$900,000! These
17 friends and their loss were all well-known to MURDOCK before
18 MURDOCK agreed to the BOGART investment.

19 **G. Parallel Cases**

20 In Jolly, supra, at 48, the court found that \$3B1.3
21 enhancement is inappropriate in a fraud case where a lender was
22 defrauded by misrepresentations of the defendant. The court
23 pointed out that "The trust in short is a specific offense
24 characteristic of fraud, and a 3B1.3 enhancement is inappropriate."
25 The court then went on to note that: "Such reliance is the hope of
26 every defendant who engages in fraud." Id. In other words, fraud
27 by definition requires reliance and reliance by definition requires
28

1 trust. Thus, the position of trust must be some special position
2 of trust, again demonstrating the link between "position of trust"
3 and "special skill." Every con man is in at least some general
4 position of trust, otherwise the victim would not rely upon the con
5 and no fraud would take place. CONTE can find not a single case
6 where trust based on friendship was sufficient to elevate the trust
7 to a level where a \$3B1.3 enhancement is warranted. See 121 ALR
8 Federal 323 (West 1994), "Increase in Base Offense Level Under
9 Sentencing Guidelines \$3B1.3 (18 U.S.C.A. Appx \$3B1.3) for Abuse of
10 Position of Public or Private Trust Significantly Facilitating
11 Commission or Concealment of Offense."

12 Again, the Jolly court relied in part on Mullens, supra, where
13 the court "rejected the government's argument that the victim's
14 confidence in Mullens as a result of membership in the same country
15 club created a relationship of trust." Likewise, the court
16 rejected that Mullens' role was like that of an investment advisor
17 because Mullens did not hold himself out as an investment broker or
18 advertise his company as an investment brokerage firm.

19 Again, in Pardo, supra, friendship of a bank manager was not
20 enough where the bank manager "who had been a personal friend of
21 Pardo's wife for ten years and was a bridesmaid at the Pardos'
22 wedding" was negligent in failing to conduct a background check on
23 Pardo. Id. at 1189. If she had, she would have discovered that
24 Pardo had already committed previous frauds at other banks. In
25 fact, given the extent of the personal relationship, the Pardo case
26 comes the closest to CONTE'S situation. The Pardo court, at 1192,
27 set out three principles:
28

1 (1) whether the position allows the defendant
2 to commit a difficult-to-detect wrong; (2) the
3 degree of authority which the position vests
4 in the defendant vis a vis the object of the
5 wrongful act; and (3) whether there has been
6 reliance on the integrity of the person
7 occupying the position. These factors should
8 be considered in light of the guiding rational
9 of the section--to punish "insiders" who abuse
10 their position rather than those who take
11 advantage of an available opportunity.

12 CONTE does not fit within any of the three categories. See
13 also, the Ninth Circuit's pronouncement, U.S. v. Hill, 915 F.2d
14 502, 509 (9th Cir. 1990), where the Ninth Circuit stated, "[T]he
15 primary trait that distinguishes a person in a position of trust
16 from one who is not is the extent to which the position provides
17 the freedom to commit a difficult-to-detect wrong." Compare Queen,
18 supra (defendant "entrusted with the discretionary authority to
19 manage his victim's assets as he saw fit;" defendant's "asserted
20 status as an investment advisor/broker was part of the fraudulent
21 misrepresentations he made to his victims.") Id. at 928.

22 H. Ninth Circuit Cases

23 Hill, supra, is instructive, even though it pre-dates the 1993
24 Application Note Amendment, supra, by which the Commission placed
25 emphasis on managerial discretion. In Hill at 506, the court
26 looked at two indicia in determining that Hill, a truck driver for
27 a moving company, had a position of trust. This is because Hill
28 stole family goods from a family who was storing the goods in Texas
while moving to Europe. The court found that the family had an
objective means of determining Hill's honesty, but not an expedient
one, and that it was difficult, if not impossible, to observe Hill
during his cross-country trek; thus, he had opportunity. Here it

1 was not at all difficult for MURDOCK to, by due diligence, check
2 out CONTE, et al. See, U.S. v. Isaacson, 155 F.3d 1083 (9th Cir.
3 1998) (bank vault teller; abuse of position of trust enhancement
4 warranted); U.S. v. Oplinger, 150 F.3d 1061 (9th Cir. 1998) (bank
5 supply coordinator; two indicia identified in Hill met; abuse of
6 position of trust affirmed); U.S. v. Thornton, 36 F.2d 1104 (9th
7 Cir. 1994) (warehouse foreman; position of trust demonstrated);
8 U.S. v. Cuff, 999 F.2d 1396 (9th Cir. 1993) (postal employee; not
9 in position of trust); U.S. v. Hoang, 106 F.3d 410 (9th Cir. 1997)
10 (bookkeeper; abuse of trust demonstrated); U.S. v. McCoy, 96 F.3d
11 1452 (9th Cir. 1996) (president of corp; no position of trust);
12 U.S. v. Chatter, 94 F.3d 653 (9th Cir. 1996) (school business
13 manager; position of trust demonstrated); U.S. v. Sabbaghi, 91 F.3d
14 157 (9th Cir. 1996) (defendant represented that he was a licensed
15 stockbroker/expert; position of trust demonstrated); U.S. v.
16 Dearborn, 995 F.2d 233 (9th Cir. 1993) (personal banker who handles
17 functions not done by ordinary tellers abused position of trust);
18 U.S. v. Ajiboye, 961 F.2d 892 (9th Cir. 1992) (mail carrier; abuse
19 of position of trust demonstrated); U.S. v. Ray, 959 F.2d 243 (9th
20 Cir. 1992) (customer service rep privy to confidential financial
21 information; abuse of trust demonstrated); U.S. v. Stover, 951 F.2d
22 364 (elementary school teacher; position of trust demonstrated);
23 U.S. v. Barnes, 125 F.3d 1287 (9th Cir. 1997) (pharmacist; 2-level
24 enhancement for abuse of position of trust or use of special skill
25 affirmed); U.S. v. Duran, 15 F.3d 131 (9th Cir. 1994) (sheriff's
26 deputy; abuse of position of trust enhancement affirmed); U.S. v.
27 Christiansen, 958 F.2d 285 (9th Cir. 1991) (credit union branch
28

1 representative; position of trust demonstrated); and U.S. v. Cozzo,
2 156 F.3d 1239 (9th Cir. 1998) (office manager for medical practice;
3 abuse of position of trust demonstrated).

4 **V. REQUEST FOR DOWNWARD DEPARTURE**

5 CONTE has filed a separate motion requesting downward
6 departure.

7 **VI. SUMMARY AND CONCLUSION/CONTE'S SENTENCING REQUESTS**

8 CONTE requests the following:

- 9 1. Criminal History Category II;
- 10 2. No increase of 2 points for position of trust under
- 11 §3B1.3;
- 12 3. Downward departure of at least 10 levels for a
- 13 Guideline range of 4-10 months (Zone B) and halfway house/work
- 14 release;
- 15 4. In event of a "sentence of imprisonment," self
- 16 surrender no earlier than 30 days after sentencing.

17 **EXHIBITS:**

- 18 1 Guideline Calculation Chart
- 19 2 Criminal History Calculation Chart
- 20 3 Amortization
- 21 4 Checks
- 22 5 Sentencing Summary Chart

23 //

24 //

1 DATED this 10 day of December, 1998.

2
3 D
4 Donald W. MacPherson
5 3404 W. Cheryl Dr., #A250
6 Phoenix, AZ 85051
7 Ph. 602-866-9566
8 Fax 602-866-3799
9 Bar #005627
10 Counsel for Defendant
11 (Pro Hac Vice Application Pending)

12 John G. Mitchell
13 John Mitchell
14 2445 5th Avenue, #200
15 San Diego, CA 92101
16 Ph. 619-237-9155
17 Fax 619-237-0128
18 Local Counsel

19 Copy of the foregoing mailed
20 this 10th day of December, 1998 date, to:

21 James Brannigan
22 Asst. U.S. Attorney
23 Federal Building
24 880 Front Street, Rm. 6293
25 San Diego, CA 92101-8893
26 Ph. 619-557-65769

27 Kenneth Ramsdell
28 Probation Officer
401 W. A, Suite 500
San Diego, CA 92101
619-557-5261

a:psmem.com

The MacPherson Group
A Professional Corporation
Attorneys at Law
3404 West Cheryl Drive
Suite A-250
Phoenix, Arizona 85051

CONTE GUIDELINE CALCULATIONS
(Before Any Downward Departure)

	<u>Probation Officer</u>	<u>Government</u>	<u>Defendant</u>
Base Offense	6	6	6
Fraud Loss	+13	+13	+13
More than minimal planning	+ 2	+ 2	+ 2
Position of trust	+ 2 ---	+ 2 ---	0 ---
Adjusted Offense Level	23	23	21
Acceptance of Responsibility	- 3 ---	- 3 ---	- 3 ---
Total Offense Level	20	20	18
Criminal History Score ¹	5	6	3
Criminal History Category	III	III	II
GL Range (months)	41-51	41-51	30-37

Exhibit 1

a:conte\glchtrs.con

¹ See Exhibit 2 for calculation.

CONTE CRIMINAL HISTORY CALCULATION

<u>\$4A1.1</u>	<u>Probation Officer</u>	<u>Government</u>	<u>Defendant</u>
(c) Utah Federal Conviction (less than 60 days imprisonment)	2	2	1
(c) Utah State Conviction (vacated)	1	1	0
(d) Offense Committed While on Probation	2	2	2
(e) Offense Committed Within 2 Years of Prior Offense	0	1	0
	---	---	---
Total	5	6	3

CONTE'S \$4A1.1 analysis: The Utah federal conviction resulted in a "sentence of imprisonment" of about 45 days, less than 60 days, thus (c), not (b) applies. The Utah state conviction was vacated, and thus, does not apply. There is no application of (e) because there is no (a) or (b).

Exhibit 2

P001/006



**Nature's
Way**

**FAX Group
and Group
(801) 489-1771
voice (801) 489-1511**

Fax No: 602-922-8453

Date October 25, 1994

 $\frac{1}{6}$

The information contained in this transmittal message is privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via the U.S. Postal Service.

10-25-94 03:38PM FROM KEN MURDOCK

TO 916029228453

P002/006

Deloitte
Haskins+Sellis

INTEREST

Release

Job:KEN Problem:amortization

Prepared by _____ Date _____

Run on 10/14/94 at 10:53

Reviewed by _____ Date _____

 RESTATEMENT OF PROBLEM ELEMENTS

Problem Type:

Present Value of a Series of Payments, With
Payments at the Beginning of the Period

Known Variables:

Periods per Year	12
Present Value.....	\$22,051.00
Annual Nominal Interest Rate.	+5.00000%
Total Number of Periods.....	60.00

Unknown Variable:

Payment.....	\$414.40
--------------	----------

CON 04546

Note: The solution was calculated based on the annual nominal interest rate a number of periods per year. Interest is computed and compounded based on periods of equal length which are determined by the number of periods per year. The effective annual interest rate in this application is 5.116

EX. 3

2/6

10-25-94 03:38PM FROM KEN MURDOCK

TO 916029228453

P003/006

Deloitte
Haskins+Sells

INTEREST

Release

Job:KEN Problem:amortization

Prepared by _____ Date _____

Run on 10/14/94 at 10:53

Reviewed by _____ Date _____

ACCRUAL BASIS SCHEDULE AS OF THE END OF THE PERIOD

PERIOD	PAYMENT	INTEREST	PRINCIPAL	BALANCE
10	414.40	90.15	324.25	21,726.75
11	414.40	88.80	325.60	21,401.15
12	414.40	87.44	326.96	21,074.19
1993	1,243.20	266.39	976.81	21,074.19
1	414.40	86.08	320.32	20,745.87
2	414.40	84.71	329.69	20,416.18
3	414.40	83.34	331.06	20,085.12
4	414.40	81.96	332.44	19,752.68
5	414.40	80.58	333.82	19,418.86
6	414.40	79.19	335.21	19,083.65
7	414.40	77.79	336.61	18,747.04
8	414.40	76.39	338.01	18,409.03
9	414.40	74.98	339.42	18,069.61
10	414.40	73.56	340.84	17,728.77
11	414.40	72.14	342.26	17,386.51
12	414.40	70.72	343.68	17,042.83
1994	4,972.80	941.44	4,031.36	17,042.83

CON 04547

10-25-94 03:38PM FROM KEN MURDOCK

TO 916029228453

P004/006

Deloitte
Haskins+Sells

INTEREST

Release

Job:KEN Problem:amortization

Prepared by _____ Date _____

Run on 10/14/94 at 10:53

Reviewed by _____ Date _____

ACCRUAL BASIS SCHEDULE AS OF THE END OF THE PERIOD

PERIOD	PAYMENT	INTEREST	PRINCIPAL	BALANCE
1	414.40	69.29	345.11	16,697.72
2	414.40	67.85	346.55	16,351.17
3	414.40	66.40	348.00	16,003.17
4	414.40	64.95	349.45	15,653.72
5	414.40	63.50	350.90	15,302.82
6	414.40	62.04	352.36	14,950.46
7	414.40	60.57	353.83	14,596.63
8	414.40	59.09	355.31	14,241.32
9	414.40	57.61	356.79	13,884.53
10	414.40	56.13	358.27	13,526.26
11	414.40	54.63	359.77	13,166.49
12	414.40	53.13	361.27	12,805.22
1995	4,972.80	735.19	4,237.61	12,805.22
1	414.40	51.63	362.77	12,442.45
2	414.40	50.12	364.28	12,078.17
3	414.40	48.60	365.80	11,712.37
4	414.40	47.07	367.33	11,345.04
5	414.40	45.54	368.86	10,976.18
6	414.40	44.01	370.39	10,605.79
7	414.40	42.46	371.94	10,233.85
8	414.40	40.91	373.49	9,860.36
9	414.40	39.36	375.04	9,485.32
10	414.40	37.80	376.60	9,108.72
11	414.40	36.23	378.17	8,730.55
12	414.40	34.65	379.75	8,350.80
1996	4,972.80	518.38	4,454.42	8,350.80

CON 04548

4/5

10-25-94 03:38PM FROM KEN MURDOCK

TO 916029228453

P005/006

Deloitte
Haskins+Sells

INTEREST

Release

Job:KEN Problem:amortization

Prepared by _____ Date _____

Run on 10/14/94 at 10:53

Reviewed by _____ Date _____

ACCRUAL BASIS SCHEDULE AS OF THE END OF THE PERIOD

PERIOD	PAYMENT	INTEREST	PRINCIPAL	BALANCE
1	414.40	33.07	381.33	7,969.47
2	414.40	31.48	382.92	7,586.55
3	414.40	29.88	384.52	7,202.03
4	414.40	28.28	386.12	6,815.91
5	414.40	26.67	387.73	6,428.18
6	414.40	25.06	389.34	6,038.84
7	414.40	23.44	390.96	5,647.88
8	414.40	21.81	392.59	5,255.29
9	414.40	20.17	394.23	4,861.06
10	414.40	18.53	395.87	4,465.19
11	414.40	16.08	397.52	4,067.67
12	414.40	15.22	399.18	3,668.49
1997	4,972.80	290.49	4,682.31	3,668.49
1	414.40	13.56	400.84	3,267.65
2	414.40	11.89	402.51	2,865.14
3	414.40	10.21	404.19	2,460.95
4	414.40	8.53	405.87	2,055.08
5	414.40	6.84	407.56	1,647.52
6	414.40	5.14	409.26	1,238.26
7	414.40	3.43	410.97	827.29
8	414.40	1.72	412.68	414.61
9	414.61	0.00	414.61	0.00
1998	3,729.81	61.32	3,668.49	0.00

CON 04549

10-25-94 03:38PM FROM KEN MURDOCK

TO 916029228453

P006/006

Deloitte
Haskins+Sells

INTEREST

Release

Job:KEN Problem:amortization

Prepared by _____ Date ____

Run on 10/14/94 at 10:53

Reviewed by _____ Date ____

ACCRUAL BASIS SCHEDULE AS OF THE END OF THE PERIOD

PERIOD	PAYMENT	INTEREST	PRINCIPAL	BALANCE
-----	-----	-----	-----	-----
TOTAL	24,864.21	2,813.21	22,051.00	0.00
	*****	*****	*****	*****

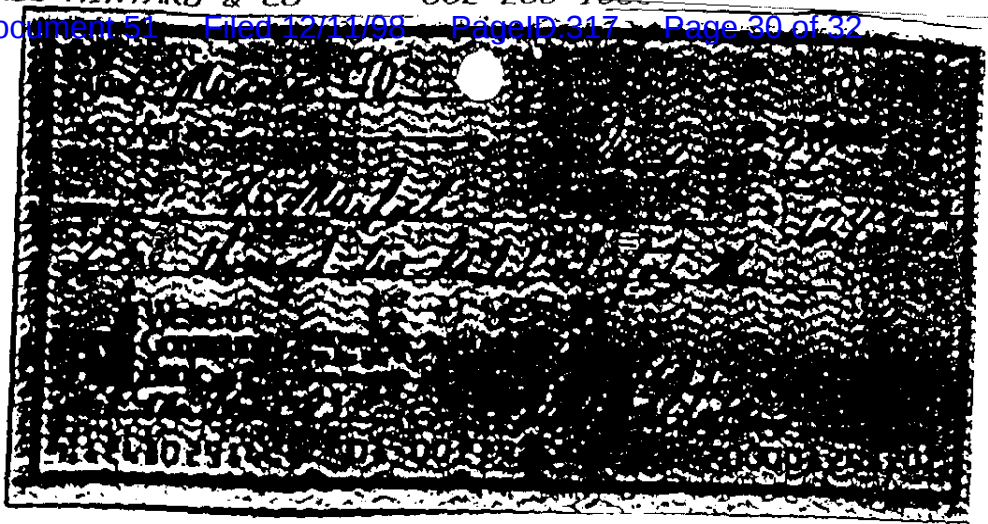
Note: The last payment of this problem includes a cumulative rounding difference caused by rounding interest amounts to whole cents in the amortization schedule. The amount of the rounding difference in the last payment is \$ 0.21 .

CON 04550

FAKED

Dec 1, 94

#1243.



Dec 5, 94

WESTERN COMMUNITY BANK

ACCOUNT NO. 5

Pay to the order of Ken Mundak \$ 5,829.00

Five hundred and eighty two and 00/100 DOLLARS

Signature: Rita Cattaneo

1243029110 01 00229 47 00000094100

Ex 4

1/2

SE FENCING SUMMARY CH RT

USPO —
AUSA —
DEF ☒Defendant's Name: Russell J. Conte Docket No. 98-0519 JMGuideline Manual Used: November 1, 1998 Agree with USPO Calc.: Base Offense Level: (Drug Quantity, If Applicable:)

Special Offense Characteristics:

Loss Sec. 2F1.1(b)(N)More than minimal planning Sec. 2F1.1(b)(2)(A)

Victim Related Adjustment:

Adjustment for Role in the Offense:

Adjustment for Obstruction of Justice:

Adjustment for Reckless Endangerment During Flight:

Adjusted Offense Level:

☐

Combined (Mult. Counts)

☐

Career Off.

☐

Armed Career Crim.

Adjustment for Acceptance of Responsibility:

Total Offense Level:

Criminal History Score:

Criminal History Category:

☐

Career Offender

☐

Armed Career Criminal

Guideline Range:

(Range limited by:

☐

minimum mand.

☐

stat. maximum)

Departures:

See Motion: POST OFFENSE REHAB;DIMINISHED CAPACITY, etc.6+13+ 221- 3183II3037month
s-10= 8TOL:8-14 mos.